

at Muncy (SCI-Muncy). We affirm.

Petitioner was employed as a corrections officer at CSI-Muncy for 19 years. Petitioner had attained the rank of lieutenant and had been serving in that position for seven months. On March 7, 2009, Petitioner was working the 2:00 p.m. to 10:00 p.m. shift, the second shift, in the restricted housing unit (RHU) when she received a report that Inmate Tania Andrews was obstructing her cell window. Petitioner called Lieutenant Adrian Hummel (CO3) in the control center regarding Inmate Andrews. Lieutenant Hummel told Petitioner that the shift commander, acting-Captain Sara Moser (CO3), was not available. Petitioner testified that Lieutenant Hummel authorized her to enter Andrews' cell and also authorized use of the Electronic Body Immobilization Device (EBID). Further, Petitioner testified that Lieutenant Hummel told her "no paperwork." Petitioner assembled a team of corrections officers.² Petitioner instructed Officer Ronald Nolte (CO1) to obtain the EBID. The team entered Andrews' cell after she refused to remove the obstruction from her window. Upon entry, Andrews retreated to the back of the cell. The team applied restraints and the EBID was used to force compliance. The team removed the contents of the cell except for the mattress, released the restraints and exited the cell. After exiting the cell, Petitioner told the team that they were not to fill out any paperwork. Andrews obstructed the window to her cell a second time. Petitioner decided to move Andrews to an observation cell. Petitioner reassembled the entry team. Andrews again tried to evade the corrections officers and restraints were applied. The team succeeded in moving Andrews to the observation cell. Petitioner again instructed the entry team that they were not required to fill out paperwork. Later during the shift, acting-Captain

² Entry into an inmate's cell by a team of corrections officers is a planned use of force.

Moser questioned Petitioner about the cell entries. Acting-Captain Moser asked whether Petitioner had completed any paperwork and whether Andrews had complied. Petitioner admitted that she had not completed any paperwork and stated that Andrews had complied. Petitioner and acting-Captain Moser then filled out paperwork (Form DC-709) documenting the two cell entries and the extraction.

On March 8, 2009, Andrews informed Officer Leesa Neece that she had been “tased” and moved from her cell the day before. Andrews showed Officer Neece “signature marks,” which Neece concluded had been made by the EBID. Officer Neece searched for any documentation regarding the cell entries, the extraction, or the use of the EBID and contacted SCI-Muncy’s control center and medical unit, but was unable to find any paperwork. Officer Neece filed a DC-121 incident report noting the injuries to Andrews. On that same day, Petitioner met with the officers who comprised the cell entry team to discuss their actions on the day before. The meeting was held in the control center and Petitioner asked employees who were not part of the team to leave the room.

On March 9, 2009, Captain Ronald Robenolt (CO4) initiated an investigation into the March 7th incident. Captain Robenolt conducted an interview with Andrews during which Andrews showed him her injuries and described the incident. Captain Robenolt directed a nurse to take pictures of the signature marks on Andrews’ leg. Robenolt also conducted a search for paperwork and video of the cell entries, but failed to find either. On March 12, 2009, Robenolt commenced interviews and took written statements from Petitioner, the cell entry team, Lieutenant Hummel and acting-Captain Moser. On March 30, 2009, Petitioner submitted a second written statement, which for the first time stated that Lieutenant Hummel had given her permission to use the EBID.

Harold Kertes, a criminal investigator with the Department of Corrections, Office of Professional Responsibility (OPR), also conducted an investigation into the March 7th incident. Kertes interviewed the members of the cell entry team and Petitioner. Following Petitioner's interview, Kertes, Captain Robenolt, and acting-Captain Moser escorted Petitioner from SCI-Muncy. At this time, Kertes instructed Petitioner that she was not to contact any of the staff members involved with the investigation. Petitioner was notified by letter dated April 21, 2009, that she was suspended without pay pending investigation, that a pre-disciplinary conference would be scheduled and that she was prohibited from contacting any staff involved in the investigation. Petitioner subsequently contacted Officer Nolte via text message on two occasions.

On May 21, 2009, Petitioner was advised by memorandum that a pre-disciplinary conference had been scheduled for May 28, 2009, and that she was being accused of violating Sections B-22 and B-29 of the Department of Corrections Code of Ethics (Code of Ethics); Department of Corrections Policy and Procedure 6.3.1, Section 32 - Use of Force, General Provisions and Videotaping; Section 33 – Restraints; Section 35 - Cell Extractions; and DC-ADM 201 - Use of Force Policy. Section B-22 of the Code of Ethics provides:

An employe shall submit any necessary and/or requested work related reports in a timely manner and in accordance with existing regulations. Reports submitted by employes shall be truthful and no employe shall knowingly enter or cause to be entered any inaccurate, false, or improper information or data, or misrepresent the facts in any Department record or report.

Reproduced Record (R.R.) at 118a. Section B-29 of the Code of Ethics provides:

All employees shall comply and cooperate with internal investigations conducted under the authority of the Department of Corrections, and respond to questions completely and truthfully. Procedure in cases that may result in criminal prosecution will include those rights accorded to all citizens of the Commonwealth.

R.R. at 119a. Facility Security Manual 6.3.1 - Section 32 requires that the commissioned officer in charge arrange for videotaping of the planned use of force, arrange for examination and photographing of the inmate and staff by the medical staff, report the use of force to the shift commander, and fill out a DC-121 form detailing the use of force. Section 33 requires the commissioned officer to contact the medical department prior to use of the EBID, obtain authorization to use the EBID from the shift commander, and complete a full written report. Section 35 requires that the shift commander authorize a cell extraction and that the extraction be videotaped. DC-ADM 201 is an administrative policy statement, which establishes the Department's policy and procedure regarding the use of force. The pre-disciplinary conference was held and the panel consisted of SCI-Muncy's healthcare administrator, SCI-Muncy's director of human resources and Major Wayne Bechdel (CO5). By letter dated June 16, 2009, Petitioner was terminated for violating Sections B-22 and B-29 of the Code of Ethics, Sections 32, 33 and 35 of Policy and Procedure 6.3.1 and DC-ADM 201.

Petitioner filed a timely appeal with the CSC. Petitioner challenged her removal from employment under Section 951(a) of the Civil Service Act³ (the Act), 71 P.S. § 741.951(a), asserting that her dismissal was without just cause. Hearing Examiner, Therese L. Kenley, conducted hearings on October 23, 2009,

³ Act of August 5, 1942, P.L. 752, *as amended*, 71 P.S. §§ 741.1-741.1005.

December 4, 2009, and January 6, 2010. SCI-Muncy presented the testimony of corrections officers: Jesse Iliams, Ronald Nolte, Cheryl Flick, Ryan Bieber, Heather Gair, Richard Harvey, Adrian Hummel, Sara Moser, Robert Heisman, Leesa Neece, Blaine Stettler, Robert Nolte and Wayne Bechdel. Harold Kertes, OPR investigator, also testified for SCI-Muncy. Petitioner also testified.

In addition to Petitioner, Officers Iliams, Nolte, Flick, Gair and Harvey constituted the cell entry team. Officers Iliam, Nolte, Bieber,⁴ Gair and Harvey all testified that Petitioner informed them that they were not to fill out any paperwork. Officers Flick, Bieber and Gair testified that they had always completed paperwork following a planned use of force. Concerning the March 8th meeting, Officers Iliams, Flick and Nolte testified that the purpose of the meeting was to come up with a story if a fact-finding investigation was initiated. Officers Gair and Harvey testified that the team agreed to say that the EBID was not used and that Andrews complied. Officers Gair and Harvey also testified that the team later decided to tell the truth. Petitioner does not deny that she told the team “no paperwork.” Petitioner testified that the completion of paperwork following a planned use of force varied from shift to shift at SCI-Muncy and that she had never completed paperwork while assigned to second shift. Petitioner also testified that the team meeting was merely to inform the team members that an investigation might be instituted and not for the purpose of orchestrating a cover-up. Lieutenant Hummel denied giving Petitioner permission to use the EBID, but acknowledged that Petitioner called him again after completing the second cell entry. Acting-Captain Moser testified that she never received a request to use the EBID or to

⁴ Officer Bieber was assigned to the RHU control center and observed the cell entries from his post.

conduct a planned use of force. Following the hearing, both parties submitted briefs in support of their respective positions. The CSC issued an adjudication upholding Petitioner's termination. This appeal followed.

Petitioner asserts that the CSC erred in upholding her termination for three reasons.⁵ Petitioner contends that her termination was without just cause because she was following the order of a superior officer. She argues that it was improper to terminate her for failure to cooperate in the investigation because she was warned that criminal charges could be filed and *Miranda* warnings were not provided. Petitioner further maintains that the CSC erred in limiting the scope of her counsel's cross-examination of witnesses regarding the Code of Ethics.

Petitioner asserts that the CSC's decision was without just cause because she was following the order of a superior officer. The Act provides that "no regular employe in the classified service shall be removed except for just cause." Section 708 of the Act, 71 P.S. § 741.708. The Act does not define just cause, but courts have held that just cause relates to merit and touches upon the competency and ability of an employee to perform her duties in a rational and logical manner. *Dep't of Corrections v. State Civil Serv. Comm'n (Mason)*, 837 A.2d 1273 (Pa. Cmwlth. 2003). The burden is upon the appointing authority to demonstrate that just cause for terminating the civil service employee exists. *Id.* The CSC is the sole fact-finder and has exclusive authority to assess the credibility of witnesses and resolve the evidentiary conflicts. *Hetman v. State Civil Serv. Comm'n (Berks County Children & Youth)*, 714 A.2d 532 (Pa. Cmwlth. 1998).

⁵ The scope of this Court's review of the CSC's adjudication is limited to determining whether an error of law has been committed or whether necessary findings of the CSC are supported by substantial evidence. *Dep't of Corrections v. State Civil Serv. Comm'n (Clapper)*, 842 A.2d 525 (Pa. Cmwlth. 2004).

Termination for just cause is a question of law subject to plenary review by this court. *Id.*

Petitioner argues that the CSC's decision is error because she was following a lawful order of a superior officer as required by the Code of Ethics. Petitioner cites Section B-9 of the Code of Ethics which provides:

Lawful orders by a supervisor to a subordinate must be executed promptly and faithfully by the subordinate even though the employe may question the wisdom of such order. The privilege of formally appealing the order may be done at a later date through either the supervisory command structure, civil service appeal, or the grievance machinery.

R.R. at 113a. Petitioner's argument hinges on two premises: that Lieutenant Hummel was her superior officer and that his order was lawful. Petitioner testified that she believed that Lieutenant Hummel was her superior because he had held the rank of CO3 for three years, while she had only attained the rank of CO3 seven months prior. Captain Robenolt testified that corrections officers learned the chain of command during their training and that the chain of command consisted of five levels from CO1 to CO5. Lieutenant Hummel testified that he was the same rank as Petitioner and that he did not have any authority over Petitioner.

The CSC rejected Petitioner's claim that Lieutenant Hummel was her superior officer for several reasons. The CSC found that following the cell entries, Petitioner failed to act in accordance with documentary standards required by the appointing authority known by both Petitioner and the cell entry team. The CSC also found that Petitioner knew her actions were unauthorized and in violation of the appointing authority's requirements, because Petitioner failed to provide an accurate account of the cell entries to acting-Captain Moser. The CSC pointed to

Petitioner's informing acting-Captain Moser that Andrews had complied when in fact Andrews did not comply as she evaded the entry team and the team was forced to subdue her by use of the EBID. The CSC concluded that Petitioner would not have lied if she believed that Lieutenant's Hummel's directions were valid.

Having reviewed the record, we conclude that CSC's decision is not erroneous. The policies and procedures in effect at SCI-Muncy required Petitioner to obtain permission from the shift commander to use the EBID and also required Petitioner to report a planned use of force to the shift commander as soon as possible. Petitioner also failed to comply with the policies regarding videotaping of cell entries and examination of the inmate and cell entry team by the medical staff. Even if Petitioner perceived Lieutenant Hummel to be her superior, this perception does not excuse her failure to obtain the permission of the shift commander to use the EBID and her failure to fully and accurately inform the shift commander of the planned use of force because Lieutenant Hummel was not the shift commander on March 7th.

Petitioner also argues that the CSC's conclusion that the March 8th meeting was for the purpose of orchestrating a cover up is not supported by substantial evidence because the testimony of the appointing authority's witnesses was inconsistent. The CSC determined that whether Petitioner's effort was initially intended to encourage falsification was irrelevant because the meeting resulted in a group decision to indicate that Andrews had complied.

Petitioner testified that the purpose of the meeting was to prepare for a potential fact-finding investigation. Although the specific recollections of the corrections officers regarding the March 8th meeting varied, the testimony reflected that the meeting was not simply an attempt by Petitioner to notify the cell entry

team of a possible investigation. The CSC clearly credited the testimony of the cell entry team over that of Petitioner. We conclude that the CSC's finding regarding the March 8th meeting is supported by substantial evidence.

Petitioner also challenges the CSC's conclusion that she violated Section B-29 of the Code of Ethics because she failed to cooperate with Kertes' investigation. Petitioner asserts that charging her with a failure to comply with the investigation is not supported by the record because Kertes failed to read her *Miranda* warnings despite informing her that the investigation could result in criminal charges. Kertes testified that Petitioner was belligerent, refused to look at him, refused to write a statement as requested, screamed at him and used obscenities during the interview. Petitioner admitted that she used obscenities. She testified that Kertes called her a liar and demanded that she write a new statement. She testified that she believed Kertes wanted her to write a statement that differed from her previous statements and it never occurred her to her that she could provide the same statement again as she had previously submitted.

Petitioner's arguments regarding Kertes's failure to read the *Miranda* warnings is without merit. First, because Petitioner was never in custody, *Miranda* warnings were not required. *Com. v. Housman*, 604 Pa. 596, 986 A.2d 822 (2009); *Cullenen v. Com.*, 588 A.2d 988 (Pa. Cmwlth. 1991). Moreover, the CSC's conclusion regarding Petitioner's violation of Section B-29 was not based solely on her behavior during the Kertes' interview. The CSC also relied upon Petitioner's failure to state in her original statement that Lieutenant Hummel authorized her to use the EBID. Petitioner testified that the first statement was incomplete because she did not trust Captain Robenolt because he had never had a nice thing to say to her or about her. The CSC also relied upon the convening of the March 8th

meeting and Petitioner's violation of the instructions not to contact involved staff members prior to the pre-disciplinary hearing. In addition, a failure to read *Miranda* warnings does not excuse Petitioner's screaming and use of obscenities. We conclude that the CSC's finding that Petitioner violated Section B-29 of the Code of Ethics is fully supported, and the lack of *Miranda* warnings is legally irrelevant.

Finally, Petitioner asserts that the CSC erred in failing to permit counsel to cross-examine the appointing authority's witnesses regarding the Code of Ethics. During the hearings, Petitioner's counsel proffered:

Part of her defense will be she received an order from Lieutenant Hummel saying no paperwork on the extraction. All right. She followed an order. He followed an order. Everybody else involved in this case followed an order of a superior. And I think that that is key to her defense. And the fact is that it's in the Code of Ethics that if you didn't think it was a valid order what you could do about it.

R.R. at 72a. Relying upon Pennsylvania Rule of Evidence 607(b),⁶ Petitioner contends that cross-examination of the appointing authority's witnesses would have helped in impeaching the witnesses' credibility.

Petitioner's argument is without merit. As discussed above, Petitioner knew that failing to fill out paperwork was procedurally improper, thus the alleged order was not lawful. Further, Lieutenant Hummel was not her superior officer, and even if he were, it was not within his power to authorize use of the EBID. Cross

⁶ We note that Petitioner cites to Rule 608(B), but quotes the text of Rule 607(b). Rule of Evidence 607(b) provides: "The credibility of a witness may be impeached by any evidence relevant to the issue, except as otherwise provided by the statute or these rules."

examining the appointing authority's witnesses regarding whether they were following an order has no relevance to Petitioner's failure to properly fill out paperwork and obtain the proper authorization to use the EBID. In addition, hearings before the CSC do not require strict enforcement of the Rules of Evidence. 4 Pa. Code § 105.13(a). The CSC did not err in limiting the cross examination of the appointing authority's witnesses.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tina M. Bennett, :
 :
 : Petitioner :
 :
 : v. : No. 1769 C.D. 2010
 :
 :
 : State Civil Service Commission :
 : (State Correctional Institution at :
 : Muncy and Department of Corrections), :
 : Respondents :
 :

ORDER

AND NOW, this 19th day of May, 2011, the order of State Civil Service Commission is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge